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IN THE SUPREME COURT

of the

UNITED STATES

October Term 1972

No. 72-1643

CONTINENTAL CASUALTY COMPANY, an Illinois Corporation,

Petitioners,

vs.

J. G. LINK & COMPANY, a Co-Partnership of J. G. LINK and ELMER F. LINK, WAYRYNEN FUNERAL HOME, INC., a Montana Corporation, and RAY WAYRYNEN and MRS. RAY WAYRYNEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief of Respondents Wayrynen Opposing Petition for Writ of Certiorari

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vs.

J. G. LINK & COMPANY, a Co-Partnership of J. G. LINK and ELMER F. LINK, WAYRYNEN FUNERAL HOME, INC., a Montana Corporation, and RAY WAYRYNEN and MRS. RAY WAYRYNEN,

Respondents.

Brief of Respondents Wayrynen Opposing Petition for Writ of Certiorari

Opinion

The findings of fact and conclusions of law are set forth in Appendix "A" of the Petition. The order of the District Court ruling on post-trial motions is set forth in Appendix "A" of this Brief. The opinion of the Court of Appeals (Appendix "B" of the Petition) reversing the judgment of the District Court is reported at 470 F. (2d) 1133 (9th Cir. 1972).

Jurisdiction

The judgment of the Court of Appeals (Appendix "C" of the Petition) was dated and entered December 15, 1972. Timely petition for rehearing was filed, and subsequently denied on March 12, 1973, (Appendix "D" of the Petition). This Court can assume jurisdiction by virtue of 28 U.S.C. §1254(1).

Questions Presented By Petitioner For Review

1. If, in the trial of an action without a jury, a District Court does not apply state rules of contract interpretation and also excludes evidence offered by an insurer which would be material and admissible in aid of insurance contract interpretation under state rules of evidence if the insurance contract is ambiguous, but, nevertheless, enters judgment in favor of the insurer on other grounds, may a Court of Appeals which reverses the District Court judgment, because it considers the insurance contract ambiguous, direct entry of judgment against the insurer without remanding to the District Court for further proceedings in which the state rules of contract interpretation are applied and the excluded evidence admitted and considered?

2. Whether a Court of Appeals may reverse a District Court judgment and direct entry of judgment for the appellant, when the Court of Appeals concedes that a contention advanced by the appellee has possible merit as grounds for affirming the District

Court judgment which was entered on other grounds, by assuming that the District Court determined that no issue existed on such contention?

Statutes Involved

§13-806, Revised Codes of Montana: *Restraints upon legal proceedings.* "Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract, by the usual proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void."

(Volume 2, p. 94)

§58-211, Revised Codes of Montana: *Impossible or unlawful conditions void.* "A condition in a contract, the fulfillment of which is impossible or unlawful, within the meaning of the chapter on the object of contracts, or which is repugnant to the nature of the interest created by the contract, is void."

(Volume 4, p. 24)

Statement of the Case

This is a case involving the question of whether or not there was insurance coverage under an architects' errors and omissions policy issued by the Petitioner, CONTINENTAL CASUALTY COMPANY, (Continental). Respondents RAY WAYRYNEN, MRS. RAY WAYRYNEN, and WAYRYNEN FUNERAL HOME, INC. (Wayrynen) brought suit against Respondents J. G. LINK & COMPANY,

et al, (Link) in State District Court in Montana, alleging damages resulting from errors and omissions. Respondents Link had a policy with Petitioner, but Petitioner refused to defend the State Court action or to provide coverage under the policy upon the ground that no claim had been made within the policy period as required by the terms of the policies.

The Links brought a third party action against Continental in State Court, and Continental removed a portion of the action which related to insurance coverage to Federal District Court. Respondents Wayrynen recovered a judgment against the Respondents Link in the State Court and then brought suit on the judgment against Continental in the Federal Court. The two Federal Court actions were consolidated for trial.

In the Federal District Court, the Wayrynens and Links, as Plaintiffs, alleged, among other things, that the provisions of the policy which provided that both the negligence of the architect and the claim by the injured party had to occur within the one year policy period for there to be coverage was void as contrary to Montana law. The District Court, while it found the facts to be generally as contended by the Plaintiffs, found in favor of the Petitioner, Continental, citing the legal defenses of lack of notice, estoppel and lack of cooperation as the reasons.

Within the time provided by the Federal Rules of Civil Procedure the Wayrynens and the Links then moved the District Court to amend the findings, to

make new findings and to enter a new judgment in their favor. The motion was thoroughly briefed by all parties, and then the District Judge issued an order which recognized that his findings were in error with respect to cooperation and held that cooperation between insurer and insured as required by the policy in question was not an issue in the case but affirmed his earlier decision upon the ground that proper notice had not been given.

On appeal by these Respondents to the Circuit Court, the Court of Appeals for the Ninth Circuit reversed the District Court and entered its judgment for the Respondents. There was no cross appeal by the Petitioner with respect to the Court's ruling on cooperation.

The Court of Appeals unanimously held that the policy provision which required both negligence by the architect and a claim by the party injured thereby to occur within the policy period violated specific Montana statutes and cases. The Court of Appeals further held that the District Court was in error in holding that Continental's other legal defenses were valid. Continental then petitioned the Court of Appeals for rehearing and suggested the appropriateness of a rehearing in banc. Both the petition for rehearing and the suggestion for in banc review were rejected by the Circuit Court.

ARGUMENT

The Interpretation of the "If Claim Clause" By the Court of Appeals Was as a Matter of Law

The basic contention of the Petition raised under Question "1." of the questions presented for review relates to the so-called "if claim clause" of the policy which provides as follows:

> "IV. Policy Period, Territory
>
> (a) During the Policy Period
>
> The insurance afforded by this policy *applies to errors, omissions or negligent acts which occur* within the United States of America, its territories or possessions, or Canada *during this policy period if claim therefor* is first made against the insured *during this policy period.*" (Emphasis supplied.) [1]

The Petitioner is contending that since the Court of Appeals held that this provision was ambiguous, it should have remanded the case to the District Court for further evidence to resolve the ambiguity. The Petitioner claims that it offered such evidence at the trial of the case in the District Court and that it was improperly rejected.

However, the Circuit Court not only held that the provision of the policy quoted above was ambiguous, but it also held that if the interpretation sought by Continental were the correct interpretation, then the provision violated the public policy of the State of Montana and was void and unenforcible. The Court of Appeals summarized its conclusion by stating:

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[1] Appendix of Petition, pg. A-6.

> "An insurance company will not be permitted to deny liability under a policy that is so vague that no matter what the circumstances, the company may deny that coverage exists.
>
> This is such a situation." [2]

The Court of Appeals then goes on to consider all of the interpretations of the policy urged by the parties, holding that it need not decide which interpretation is correct, since under the statutes and case law of Montana, coverage is provided in any event. [3]

Thus, a remand of the case to receive evidence in support of Petitioner's interpretation of the policy provision would be a useless act, since even assuming it were correct, there would still be coverage. Even if this policy provision were clear and provided what the Petitioner contends it provides, the Court of Appeals was correct in holding it invalid. [4]

It should be noted that the Petitioner offered no evidence to the District Court which would suggest a "meeting of the minds" between the Links and Continental as to the meaning of the "if claim clause" at the time the policy was issued. Rather, the evidence which the Petitioner sought to introduce was evidence of consultations between the American Institute of Architects and Continental. [5]

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[2] Appendix "B" of Petition, pg. B-8.

[3] Appendix "B" of Petition, pgs. B-6 through B-11.

[4] See §13-806 R.C.M.; §58-211 R.C.M.; *Weissman & Sons* v. *St. Paul Ins. Co.*, 52 Mont. 291, 449 P. (2d) 740, 744 (Mont. 1969).

[5] Trial Transcript, pg. 5.

Yet, during the trial of the action, counsel for Continental established that neither of the insureds was or ever had been a member of the American Institute of Architects.[6] Thus, the evidence was neither material nor competent with respect to the issues before the Court and was properly excluded at the time of trial. Even if it were proper evidence to establish Petitioner's interpretation of the contract, that fact would not aid the Petitioner under the ruling of the Court of Appeals.

Since the contention here was presented to the Court of Appeals on petition for rehearing, we have a situation where the admissibility of this evidence, which is clearly a narrow question of State law, was rejected by both courts which considered it. It is submitted that the question of the admissibility of this evidence is not a proper question for review by this Court.

The Procedure of the Court of Appeals Was Proper

Another contention which is made by the Petitioner which, apparently, relates to the issue set forth in Question "1." is that it was improper for the Court of Appeals to enter judgment for the Plaintiffs. In support of this position, the Petitioner cites a number of cases involving jury trials, which hold that where a Defendant has not made a motion for judgment N.O.V. under rule 50 (b) of the Federal Rules of

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[6] Trial Transcript, pgs. 294 and 303.

Civil Procedure, it is improper for the Court of Appeals to reverse with directions to enter judgment for the Defendant, where the basis for the decision was that there was not sufficient evidence to go to a jury. [7] See e.g.:

Cone v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1946).

The rationale of these cases is that had the trial judge been given an opportunity to rule on the motion for judgment N.O.V., the Plaintiff, under certain circumstances, would have the opportunity to dismiss without prejudice and refile unless the Defendant would suffer some legal prejudice from this procedure. [8] Since the decision as to whether or not the Plaintiff should have a new trial involves an exercise of discretion, this Court indicated that the trial judge, because of his familiarity with the case, would be in the best position to exercise this discretion. [9]

However, that rule has no application to the instant case. This case was decided by a District Judge, who solicited proposed findings of fact and conclusions of law. After the decision of the Court, these Respon-

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[7] Another reason for invoking this rule has been where the Court of Appeals has reversed, making a factual finding which the losing party has not had an opportunity to meet. See, e.g., *Fountain* v. *Filson*, 336 U.S. 681 (1949). In this case, the factual findings were all made by the District Court and no new factual findings were made by the Court of Appeals.

[8] *Cone*, supra, at pg. 217.

[9] *Id.*, at pg. 216.

dents filed extensive motions to have the Court amend its findings or to order a new trial or to direct the entry of a new judgment in accordance with their proposed findings. [10] This motion was extensively briefed and argued, and all of the contentions and arguments which were later made to the Court of Appeals were made to the District Court. Since these contentions were later considered and ruled upon by the Court of Appeals, there would be no point in remanding the case to the District Court, since there would be nothing to decide.

In this respect, it should be noted that in its decision, the Court of Appeals relied upon the factual findings of the District Court. In his findings, the District Court Judge found facts which indicated that the conditions precedent to coverage by the policy existed, [11] but that Continenal had certain legal defenses which were valid. The decision of the Court of Appeals struck down the defenses, leaving the factual findings of the District Court intact and concluded therefrom that there was coverage. It, therefore, entered judgment to that effect.

This Court has held that even in a jury case, where there has been a proper motion for a judgment N.O.V. under Rule 50(b), the Court of Appeals may

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[10] These motions resulted in the order contained in Appendix "A" to this Brief.

[11] See Findings of Fact, numbered V, VIII, IX, XIV, XVI, XVII, and XVIII. Said findings are set forth in Appendix "A" to the Petition.

remand and direct a verdict for the proper party. [12] Certainly, where, as here, the District Court has made extensive factual findings which support the conclusion of the Court of Appeals and had an opportunity to review its decision at the time of extensive post-trial motions, the action of the Court of Appeals in entering a judgment consistent with those facts was proper.

There Is No Conflict in Decisions With Respect to Construction of this Policy

Another contention made by the Petitioner which apparently relates to the first question is that the decision of the Court of Appeals in this case conflicts with its decision in *Cornell, Howland, Hayes & M, Inc.* v. *Continental Casualty*, 465 F. (2d) 22 (1972). While a reading of the latter case shows that it did not reach the issues which were determinative in this case, it should also be noted that the Court in *Cornell*, supra, was interpreting the law of Oregon, [13] while in this case, it is clear that the Court was relying on particular Montana code sections and decisions in reaching its conclusion. There is no suggestion in the *Cornell* case that similar statutes or decisions exist in Oregon. There is no conflict between these cases.

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[12] *Neely* v. *Evy Construction Co.*, 386 U.S. 317 (1967).
[13] *Cornell*, supra, at pg. 25.

The Court of Appeals Was Correct In Ruling that Cooperation Was Not an Issue

The contention of the Petitioner which relates to the second question presented for review is that since the Court of Appeals "concedes that a contention advanced by the Appellee has possible merit *as grounds for affirming the District Court*", it was in error in assuming that the contention was not an issue. The Appellee then argues that cooperation was proper basis for affirming the District Court.

However, the opinion of the Court of Appeals nowhere indicates that the cooperation issue had "possible merit as grounds for affirming the District Court." Rather, it stated that cooperation was a *contract* provision which *may* have been breached.[14] However, the Court then went on to hold that it was not a ground for affirming the District Court, since it was not an issue in the case, and had been held not to be an issue in the case by the District Court.[15]

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[14] Opinion of the Court of Appeals set forth in Appendix "B" of the Petition at page B-14.

[15] *Id.* Further, it should be noted that one of the principle holdings of the decision of the Court of Appeals was that anything the Links did or didn't do on the 6th of October, 1967 (the date of the alleged breach of the cooperation clause) would not be binding on the Wayrynens. Therefore, even if the Court were to find merit in the contention of the Petition in this respect, the judgment in favor of the Wayrynens would not be disturbed.

Both the District Court and the Court of Appeals were correct in this respect. Cooperation is an affirmative defense which must be pleaded and proved. [16]

Here, it was not pleaded, and there was no direct evidence offered by the Petitioner to prove a breach of the cooperation clause. [17] Rule 9 (c) of the Federal Rules of Civil Procedure provides: [18]

> "In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. *A denial of performance or occurrence shall be made specifically and with particularity.*" (Emphasis supplied.)

Since Continental did not plead lack of cooperation, both Montana and Federal cases indicate that this is tantamount to an admission that it is not an issue,

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[16] See citations infra at Footnote 19.

[17] There is some evidence in the record which would tend to support the contention that the cooperation clause was breached. However, the direct evidence, such as that of Mr. Worthington's set forth infra, does not support the Petitioner's contention.

[18] Rule 9 (c) of the Montana Rules of Civil Procedure is identical.

and that it may not be used to support a judgment upon appeal. [19]

Further, it is clear that a defense may be waived. [20] The record here clearly shows that Continental waived the defense of cooperation at the trial level. As indicated, there was no pleading with respect to cooperation. Further, during the trial, Mr. Worthington, the claims manager for Continental who had denied coverage, testified on cross examination as follows:

> "Q. The reason for denial of coverage was because he wasn't cooperating, in your mind?
>
> A. (Mr. Worthington) Well, I suppose we could deny on that basis, but that wasn't our purpose. *We didn't want to deny it on the basis of non-cooperation.* If we were going to deny it, we wanted it to be on the merits of the case." (Emphasis supplied.) [21]

Further, during the course of the trial, the Respondents Wayrynen objected to a question upon the grounds that cooperation was not an issue in the

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[19] *Tahalferty* v. *Wilmering*, 112 U.S. 713 (1884); *Ginsburg* v. *Ins. Co. of North America*, 427 F. (2d) 1318 (6th Cir. 1970); *Lumbermen's Mutual Ins. Co.* v. *Bowman*, 313 F. (2d) 381 (10th Cir. 1963); *Treasure State Industries* v. *Leland, et at*, 151 Mont. 280, 443 P. (2d) 22 (Mont. 1968). (The Montana law is cited in the event that this rule might be considered substantive, rather than procedural.)

[20] *Penhallow* v. *Doane's Administrators*, 3 Dallas 54 at 95 (1795).

[21] Trial Transcript, pg. 269.

case. After a discussion with counsel, the Court ruled:

> "It hasn't been raised. *Continental has just said no, we are not concerned about lack of cooperation. The witness on the stand, Mr. Worthington, said no, we are not concerned with that. There's no question of lack of cooperation in the case, sofar as I understand, either by way of pleadings or evidence.*" (Emphasis supplied.) [22]

There was *no objection* to this ruling by Continental.

Thus, the holding of the Court of Appeals was correct in that it indicated that while there may have been a possible breach of the cooperation provision, it was not an issue in the case (and hence, not a ground for upholding the opinion of the District Court). The Petitioner bases part of its argument upon the fact that the District Court made a conclusion in support of its decision on estoppel, which might also be construed as relating to cooperation. [23] However, at the time of its order with respect to the post-trial motions, the District Court recognized that any reference to cooperation in its original findings and conclusions was incorrect and specifically ruled:

"The Court is also cognizant of the fact that

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[22] Trial Transcript, pgs. 279 and 280. The record in this respect has been reproduced in Appendix "B" to this Brief.

[23] See Conclusions IX and X of the District Court which are set forth in Appendix "A" to the Petition at pages A-25 and A-26.

> it ruled at the trial that cooperation of the insured was not an issue of this case, through pleadings or otherwise. Consequently, the conclusions of law have been amended to reflect the same." [24]

This ruling of the District Court was subsequent to the judgment of the District Court and the Petitioner here did not cross appeal to have the Court of Appeals overrule this holding. [25]

The position of the Petitioner with respect to the second question presented for review is based upon the rule that the Appellee may urge any argument in support of the judgment of the lower court. However, the Petitioner overlooks the provision of the rule which requires that the argument urged by

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[24] The complete order of the District Court is set forth in Appendix "A" to this Brief.

[25] There is some question as to whether a cross appeal would be required in this case. However, it appears that the Petitioner is seeking to supplement the Decree of the District Court with a matter which was not in the record, and, therefore, a cross appeal would be required by the rule stated in *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U.S. 185 (1936) at pg. 191. See also, *Alaska Industrial Board* v. *Chugach Electric Association*, 356 U.S. 320 (1958) at pg. 325.

the Appellee *must be supported by the record.*[26] Breach of cooperation as a *defense* (and thus, a basis for supporting the District Court) is not supported by the record in this case, and the Court of Appeals was correct in its holding.

CONCLUSION

This case is one which deals with specific questions of Montana law which were correctly decided by the Court of Appeals. The Court of Appeals correctly considered the issue of cooperation, and there was no procedural error in not remanding the case to the District Court.

The petition for Certiorari does not establish any substantial or meritorious reason why, under Rule 19 of the Rules of this Court, certiorari should be granted. The issues decided in the District Court and Court of Appeals do not go beyond the interests of the

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[26] The most recent case stating this rule, cited by the Petitioner is *Dandridge* v. *Williams*, 397 U.S. 471 (1970) at pg. 475. The court in *Dandridge* set forth the rule quoting *United States v. American Ry. Exp. Co.*, 265 U.S. 425 at 435:

> "'It is likewise settled that the Appellee may, without taking a cross appeal, urge in support of a decree any matter *appearing in the record*, although his argument may involve an attack upon the reasoning of the lower court or an insistance upon a matter overlooked or ignored by it.'" (Emphasis supplied.)

parties in this particular litigation. It is, therefore, respectfully submitted that the petition for writ of certiorari should be denied.

July 10, 1973

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Appendices

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

J. G. LINK & COMPANY, a Co-Partnership, of J. G. LINK and ELMER F. LINK,

Plaintiffs,

ORDER
No. 1574

vs.

CONTINENTAL CASUALTY COMPANY, an Illinois Corporation,

Defendant.

WAYRYNEN FUNERAL HOME, INC., a Montana Corporation, and RAY WAYRYNEN and MRS. RAY WAYRYNEN,

Plaintiffs,
No. 1667

vs.

CONTINENTAL CASUALTY COMPANY, an Illinois Corporation,

Defendant.

The plaintiffs have made various motions to the court: Consolidation Motions for New Trial, To Open Judgment and Take Additional Testimony, To Amend Findings of Fact and Conclusions of Law, To Make New Findings and Conclusions, To Direct the Entry of a New Judgment, and To Certify to the Supreme Court Of The State of Montana The Question of the Validity of the "If Claim" Clause of the Insurance Policy, and the court having taken each of the motions under advisement, and being fully advised in the premises,

THEREFORE, IT IS ORDERED and this does order that the motions For a New Trial, To Open Judgment and Take Additional Testimony, To Make New Findings and Conclusions, To Direct the Entry of a New Judgment and To Certify to The Supreme Court of the State of Montana The Question of the Validity of the "If Claim" Clause of the Insurance Policy, be and the same are hereby denied. The motion to Amend Findings of Fact and Conclusions of Law be and the same is hereby granted, and the sentence

> "the failure on October 6, 1967, to make the disclosure of information required is in violation of paragraph 3 of the conditions of the insurance policy and constitutes a breach thereof on the part of the Links"

is deleted from Paragraph X of the Conclusions of Law, while Paragraph XI is amended to read

> "The Links breached the terms and conditions of the insurance policy here involved as above described; . . ."

The court feels that the issue as to whether or not insurance coverage exists is primarily controlled by the insured's failure to give notice to Continental Casualty Company of a claim for errors and omissions made by Mr. and Mrs. Wayrynen. The policy required that the insured

> "shall, as soon as practicable after receiving information as to his alleged errors, omissions or negligent acts, give written notice thereof to the Company with full particulars of any claim arising therefrom . . .

This is a condition precedent to coverage and it was not proven by the plaintiffs.

The court is also cognizant of the fact that it ruled at trial that co-operation of the insured was not an issue of this case, through pleadings or otherwise. Consequently, the Conclusions of Law have been amended to reflect the same.

Done and dated this 30th day of April, 1970.

s/ W. D. Murray

W. D. Murray
Senior United States District Judge.

Appendix B

"Q: (BY MR. LYNCH): Mr. Overfelt, why were you reluctant to let representatives of Continental talk to Mr. Link?

MR. POORE: To which the Plaintiffs Wayrynen object upon on the grounds and for the reasons that Continental is estopped to raise any claim of lack of co-operation and has also waived any claim of lack of co-operation and the question of lack of co-operation is no issue in the case.

COURT: I don't think I understand the problem.

MR. BLEWETT: I don't understand the reason for the question myself.

COURT: —What difference does it make to anyone what his (Mr. Overfelt's) opinion was?

MR. LYNCH: Your Honor, this point was raised, the lack of co-operation—

COURT: —it hasn't been raised. Continental has just said no, we are not concerned about lack of co-operation. The

witness on the stand, Mr. Worthington, said no we weren't concerned with that. There's no question of lack of co-operation in the case, as far as I can understand, either by way of pleadings or evidence." (Trial Transcript 279-280)